

**REMARKS**

**State of the Claims**

Claim 1 has been amended to reflect that the space efficiency of Applicants' snack pieces is 0.15 grams/cm<sup>3</sup>. Claim 2 has been canceled without prejudice. Claims 3, 4, and 5 have been amended to correct their claim dependency from Claim 2 to Claim 1. No new matter has been added.

**Information Disclosure Statement**

In the office action, the Examiner states that the information disclosure statement fails to comply with the provisions of 37 CFR §§ 1.97, 1.98 and MPEP § 609 because the non-patent literature references do not disclose a publication date. The Examiner further states that in order to speed along prosecution, it will be assumed that the publication dates of these references (namely, the snack samples provided by Applicant and listed in his Table 1 of the specification) were sometime before the filing date of this application since they are described in the specification. The Examiner further notes that this would equate to either 35 U.S.C. § 102(a) or 102(b) publication dates--“In order to speed prosecution, both rejections will be made.”

Applicants respectfully note that although the Examiner has declared Applicant's IDS to be non-compliant, the Examiner has in fact considered all of the non-patent literature references, their deficiencies notwithstanding. This is noted by 1) the Examiner's initialing of each of the non-patent literature references, 2) the Examiner's own statement of use of the references, and 3) the actual use of the references as is recounted in all of the 35 U.S.C. §§ 102(a or b) and 103(a) rejections in the Examiner's office action noted above.

Applicant also notes that Applicant's Attorney was unable to provide the “publication” dates of the non-patent references because each of the references is a sample of competitive product having its origin outside of the control of Applicant's Assignee, namely, Procter & Gamble. Further, Applicant's Attorney is not privy to the internal release dates of competitive product.

The Examiner suggests that Applicants call the respective companies to inquire as to the dates of first market of the respective products. Also, the Examiner states that this information is not internal information since it is merely the date when the company first started marketing or selling the product.

Applicants respectfully disagree with the Examiner's assertions. First, Applicants point out that while they may be able to call a company's “hotline”, to the extent that one actually

exists, no company is under any compulsion to provide the requested data to Applicants. Applicants also point out that information is most certainly “internal” to a company where the company resides in near exclusive control of the information, which is demonstrated by the Examiner’s suggestion to “call these companies” to get the information.

Therefore, Applicants continue to assert that their ability to accurately pinpoint the first date of marketing of the products listed in their IDS is tenuous at best and not necessarily gained from the Examiner’s suggestion to call the companies.

35 U.S.C. § 102(a) or (b) Rejection

Claim 1 stands rejected under 35 U.S.C. § 102(a) or (b) as being anticipated by Snack-A-Dip. The Examiner states that Snack-A-Dip teaches a kit comprising a canister containing a plurality of snack pieces, the snack pieces having a average projected area of about  $1330 \text{ mm}^2$ , an attached tub containing a dip condiment, the kit further having a space efficiency of about  $0.126 \text{ g/cm}^3$ . The Examiner also states that the determination of the average projected area was by the method outlined by Applicants on page 7 of their specification wherein three randomly selected whole chips were measured and averaged.

According to MPEP § 2131 a claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference. The identical invention must be shown in as complete detail as is contained in the claim. The elements must be arranged as required by the claim.

Applicants respectfully disagree with the Examiner’s contentions. First, Applicants point out that they have amended Claim 1 to now claim a space efficiency of at least  $0.15 \text{ grams/cm}^3$ . At best, Snack-A-Dip has a space efficiency of  $0.134 \text{ grams/cm}^3$ .<sup>1</sup> Therefore, this element is missing, and the Examiner’s rejection for anticipation is obviated.

The Examiner further asserts that Snack-A-Dip snack pieces have an average projected area of about  $1330 \text{ mm}^2$ . The Examiner bases this assertion upon his “determination of the average projected area...by the method outlined by applicant on page 7 of the specification wherein three randomly selected whole chips were measured and averaged.”<sup>2</sup>

Applicants respectfully contend that the Examiner’s assertion of measurement is unclear since the Examiner did not properly specify how he made his measurements amongst the four possible choices. Nor did the Examiner provide any proof or evidence of his having made the

---

<sup>1</sup> Applicants’ Specification at page 6, TABLE 1.

<sup>2</sup> Examiner’s Office Action dated March 21, 2003 (Paper No. 7).

measurements. The Examiner therefore seemingly requests Applicants to rely solely on his unsupported assertion of having a) made the requisite measurements and b) having made them correctly. Specification at page 7:

The projected area listed in Table 1 for these kits was an average calculated projected area and was calculated by randomly selecting three whole chips from the kits, measuring each chip's projected area and then calculating the average of these projected areas. Projected area, as used herein, is essentially the area within the two-dimensional outline of the shape of the snack piece. This two-dimensional cross sectional "footprint" of the snack piece forms a projected area that can be determined either (1) by area calculations of a known geometry, (2) a curve integrator, (3) superimposing the actual drawn area on grid paper with predetermined area markings, or (4) by comparing the weight of a piece of paper cut to the footprint outline to a weight of similar paper with a known area. To measure the projected area of the individual snack piece, the snack piece to be measured is placed in an orientation that will yield the largest possible projected area.<sup>3</sup>

While claiming to have measured three randomly selected snack pieces, the Examiner has not actually indicated by which method of the four possible methods that he has measured the snack pieces. Nor is it clear from the Examiner's comments that he actually made the measurements and calculations properly and correctly. The Examiner has provided no evidence and only his assertions, of his measurements. Applicants also point out that they have measured the snack pieces in Snack-A-Dip and have determined an average projected area of only 1060 mm<sup>2</sup>. Applicants assert that their calculations are proper and correct and that the Examiner has not properly disputed Applicants' measurements.

Thus, Applicants respectfully request reconsideration and allowance of Claim 1 over the Examiner's 35 U.S.C. § 102(a) or (b) rejection. Applicants also respectfully request that the Examiner present, in greater and more detail, the exact methodology from which his measurements for average projected area for Snack-A-Dip snack pieces derive and evidence of the Examiner's measurements and calculations.

#### 35 U.S.C. § 103 Rejection

Claims 2-3 and 17-19 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Snack-A-Dip in view of Yan Yan Snacks Meiji.

To establish a *prima facie* case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the

---

<sup>3</sup> Applicants' Specification, page 7, lines 2-12.

knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success.

Finally, the prior art reference must teach or suggest all the claim limitations. (MPEP § 2142).

Applicants respectfully contend that the combination of Snack-A-Dip and Yan Yan does not teach Applicants' invention. First, the combination of references teach only an average projected area of whole chips of either 1066 mm<sup>2</sup> (Snack-A-Dip) or 1190 mm<sup>2</sup> (Yan Yan). Despite the Examiner's assertions of a 1300 mm<sup>2</sup> area projected area for the Snack-A-Dip snack pieces, these measurements are unclear (as noted above) and have not been shown by the Examiner to be proper and correct. Applicants, because of their scientific background, stand in the best position to make the proper measurements especially when, as is the occasion herein, the Examiner has not clearly and unambiguously articulated his exact methodology for measuring the average projected area of whole chips for Snack-A-Dip snack pieces nor provided evidence therefore of his measurements.

Further stated, Applicants assert that the combination of Snack-A-Dip and Yan Yan does not teach or suggest Applicants' average projected area of whole chips to be 1300 mm<sup>2</sup> and that the Examiner's measurements cannot be reliably depended upon. As such, the rejection for obviousness should be obviated. Therefore, Applicants respectfully request reconsideration and allowance of Claims 2-3 and 17-19 over the Examiner's 35 U.S.C. § 103(a) rejection.

Claims 5 and 20 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Snack-A-Dip in view of Yan Yan Snacks Meiji and further in view of Bezek, et al. (U.S. Patent No. 6,472,007).

Applicants respectfully contend that the combination of Snack-A-Dip and Yan Yan, further in view of Bezek, et al. '007 does not teach Applicants' invention. First, the combination of references teach only an average projected area of whole chips of either 1066 mm<sup>2</sup> (Snack-A-Dip) or 1190 mm<sup>2</sup> (Yan Yan)--Bezek, et al. '007 does not teach an average projected area of its whole chips.

Also, despite the Examiner's assertions of a 1300 mm<sup>2</sup> area projected area for the Snack-A-Dip snack pieces, these measurements are unclear (as noted above) and have not been shown by the Examiner to be proper and correct. Applicants, because of their scientific background, stand in the best position to make proper and correct measurements especially when, as is the occasion herein, the Examiner has not clearly and unambiguously articulated his exact

methodology for measuring the average projected area of whole chips for Snack-A-Dip snack pieces nor provided evidence therefore of his measurements.

Thus, since the combination of references fail to teach or suggest Applicants' average projected area of whole chips to be 1300 mm<sup>2</sup>, Applicants respectfully request reconsideration and allowance of Claims 5 and 20 over the Examiner's 35 U.S.C. § 103(a) rejection.

Claims 4 and 6 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Snack-A-Dip in view of Yan Yan Snacks Meiji and further in view of Tostitos Chips & Salsa.

Applicants assert that the combination of Snack-A-Dip, Yan Yan and Tostitos Chips & Salsa does not teach or suggest Applicants' invention. First, the references do not teach or suggest Applicants' average projected area of whole chips to be 1300 mm<sup>2</sup> for all of the reasons noted herein above. Applicants contend that without such teaching or suggestion, the combination of references cannot be said to provide a *prima facie* case of obviousness against Applicants' invention.

Thus, Applicants respectfully request reconsideration and allowance of Claims 4 and 6 over the Examiner's 35 U.S.C. § 103(a) rejection.

**SUMMARY**

The rejection in the Office Action has been discussed and, Applicants believe, the proper amendments have been set forth to address the rejection.

In light of both the amendments and the discussions contained herein, Applicants respectfully request reconsideration of the rejection and its withdrawal.

Issuance of a Notice of Allowance at an early date is earnestly solicited.

Respectfully submitted,

Michael Dean McCutchan

By: \_\_\_\_\_ 7

Theodore P. Cummings, Esq.  
Attorney for Applicants  
Registration No. 40,973  
(513) 634-1906

July 28, 2003

Customer Number 27752